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Hasnah bt Hashim v Bina Puri Sdn Bhd & Anor

B HIGH COURT (KUALA LUMPUR) — JUDICIAL REVIEW NO WA-25–306–10 OF 2023
AMARJEET SINGH J
21 APRIL 2025

C *Labour Law — Constructive dismissal ('CD') — Whether CD claim not proven — Whether Industrial Court was correct in dismissing the claim — Whether company's assignment of claimant to oversee project site outstation was within her job portfolio and did not breach terms of her employment contract — Whether claimant's challenge against Industrial Court's award by way of judicial review was* D *wrong as she should have filed an appeal — Industrial Relations (Amendment) Act 2000 s 33C*

The applicant was employed by the respondent ('the company') as senior mechanical and electrical (M&E) manager. She was, among other things, E required to supervise the company's construction projects at site. When the Covid-19 pandemic hit the nation in March 2020 and badly affected the company's business, the applicant did not agree with the various cost-cutting measures proposed by the company to get through the difficult period and, instead, negotiated for a mutual separation scheme ('MSS') package. Despite F several rounds of negotiations, the parties could not reach agreement on the package details. In the meanwhile, on account of the fact that the company urgently required an M&E expert to oversee a project in Tasik Kenyir, Terengganu, and the applicant was the best qualified to undertake the task, the company informed the applicant that she would have to be at the project site G several times a week over a three-month period. In response, the applicant wrote to the company stating that she considered herself to have been constructively dismissed by reason of the company's action in forcing her to take on new responsibilities at Tasik Kenyir — which was about 231km away from her then residence — without giving her due notice and whilst the H negotiations on the MSS package were still ongoing. The company immediately replied that her allegations were baseless as the assignment was within her job scope and expertise. The company requested her to report for work failing which she would be treated as having resigned voluntarily. The applicant refused to budge from her position and on 3 June 2021 reported her I 'dismissal' to the Director-General of Industrial Relations ('DGIR') under s 20 of the Industrial Relations Act 1967 ('the IRA'). As the matter could not be resolved, the DGIR on 18 February 2022 referred her complaint to the Industrial Court for adjudication. The Industrial Court dismissed the applicant's claim after finding, inter alia, that her assignment to oversee the

Tasik Kenyir project was within her job scope and did not breach the terms of her contract of employment and was neither done in bad faith nor a bad labour practice. The applicant filed the instant judicial review application to quash the Industrial Court's award. The company raised a preliminary objection that the application was incompetent since an amendment to the IRA required that with effect from 1 January 2021, any challenge to an award must be made by way of appeal to the High Court and not by way of judicial review.

Held, dismissing the judicial review application:

(1) The judicial review application was struck out for being incompetent. The company's preliminary objection was rightly taken as the applicant should have challenged the award by way of an appeal and not by way of judicial review (see paras 19 & 32).

(2) Since the applicant had made her representations to the DGIR after the Industrial Relations (Amendment) Act 2000 [Act A1615] came into force on 1 January 2021, s 35(1) of that Act did not apply and the applicant's challenge against the Industrial Court's award had to be by way of appeal to the High Court and not by way of judicial review. Challenging the award by way of judicial review would only have been proper if the applicant had made her representations before 1 January 2021 as held in the Court of Appeal's decision in *Rosli Saad v SG Concrete Products (M) Sdn Bhd & Another Appeal* [2024] MLRAU 340 which was binding on this court (see paras 28–32).

(3) Even on the merits, the judicial review application had to be dismissed. The Industrial Court had correctly found on the evidence that the applicant had not made out a case of constructive dismissal (see para 33).

(4) The responsibility of overseeing and monitoring the Tasik Kenyir project site was within the applicant's job description and did not breach the terms of her contract of employment. The applicant was not transferred to Tasik Kenyir as she had alleged. She was only required to be at the project site for 3–4 days in a week over a three-month period. The applicant was still stationed at the company's headquarters at Bukit Idaman. The ground alleging transfer had no merit as were the grounds that she was not given detailed notice of the job description and notice of reimbursements (see paras 43, 50, 52 & 62–63).

[Bahasa Malaysia summary

Pemohon telah bekerja dengan responden ('syarikat') sebagai pengurus kanan mekanikal dan elektrikal (M&E). Antara tanggungjawabnya ialah menyelia projek pembinaan syarikat di tapak. Apabila pandemik Covid-19 melanda negara pada Mac 2020 dan menjejaskan perniagaan syarikat, pemohon tidak bersetuju dengan pelbagai langkah penjimatan kos yang dicadangkan oleh syarikat untuk menghadapi tempoh sukar tersebut. Sebaliknya, dia berunding

untuk mendapatkan pakej skim pemisahan bersama ('SPB'). Walaupun beberapa kali rundingan diadakan, pihak-pihak tidak mencapai persetujuan mengenai butiran pakej tersebut. Dalam pada itu, memandangkan syarikat amat memerlukan seorang pakar M&E untuk menyelia projek di Tasik Kenyir, Terengganu, dan pemohon merupakan orang yang paling layak untuk melaksanakan tugas tersebut, syarikat memaklumkan kepada pemohon bahawa dia perlu berada di tapak projek beberapa kali seminggu dalam tempoh tiga bulan. Sebagai respons, pemohon menulis kepada syarikat menyatakan bahawa dia menganggap dirinya telah diberhentikan secara konstruktif kerana tindakan syarikat memaksanya memikul tanggungjawab baharu di Tasik Kenyir — yang terletak kira-kira 231km dari kediamannya ketika itu — tanpa memberikan notis yang sewajarnya dan ketika rundingan pakej SPB masih berlangsung. Syarikat tersebut membalas dengan menyatakan tuduhan tersebut tidak berasas kerana tugasan itu masih dalam skop kerja dan bidang kepakarannya. Syarikat meminta pemohon melaporkan diri untuk bekerja, jika tidak dia akan dianggap telah meletakkan jawatan secara sukarela. Pemohon tetap berpegang pada pendiriannya dan pada 3 Jun 2021 telah melaporkan 'pemberhentian' dirinya kepada Ketua Pengarah Perhubungan Perusahaan ('KPPP') di bawah s 20 Akta Perhubungan Perusahaan 1967 ('APP'). Memandangkan perkara itu tidak dapat diselesaikan, pada 18 Februari 2022 KPPP merujuk aduan pemohon ke Mahkamah Perusahaan untuk penentuan. Mahkamah Perusahaan menolak tuntutan pemohon selepas mendapati, antara lain, bahawa tugasan untuk menyelia projek Tasik Kenyir adalah dalam skop kerjanya, tidak melanggar terma kontrak perkhidmatan, dan tidak dilakukan dengan niat jahat atau amalan buruh yang buruk. Pemohon kemudian memfailkan permohonan semakan kehakiman untuk membatalkan award Mahkamah Perusahaan tersebut. Syarikat membangkitkan bantahan awal bahawa permohonan itu adalah tidak kompeten kerana pindaan kepada APP yang berkuat kuasa mulai 1 Januari 2021 memperuntukkan bahawa sebarang cabaran terhadap award mesti dibuat melalui rayuan ke Mahkamah Tinggi dan bukan melalui semakan kehakiman.

Diputuskan, menolak permohonan semakan kehakiman:

(1) Permohonan semakan kehakiman telah ditolak kerana dianggap tidak kompeten. Bantahan awal syarikat adalah wajar memandangkan pemohon sepatutnya mencabar award tersebut melalui rayuan dan bukan melalui semakan kehakiman (lihat perenggan 19 & 32).

(2) Memandangkan pemohon telah membuat representasinya kepada Ketua Pengarah Perhubungan Perusahaan ('KPPP') selepas Akta Perhubungan Perusahaan (Pindaan) 2000 [Akta A1615] mula berkuat kuasa pada 1 Januari 2021, s 35(1) akta tersebut tidak terpakai dan cabaran pemohon terhadap award Mahkamah Perusahaan hendaklah dibuat melalui rayuan ke Mahkamah Tinggi dan bukan melalui semakan kehakiman. Mencabar award melalui semakan kehakiman hanya

dibenarkan sekiranya representasi dibuat sebelum 1 Januari 2021 sebagaimana diputuskan oleh Mahkamah Rayuan dalam kes *Rosli Saad v SG Concrete Products (M) Sdn Bhd & Another Appeal* [2024] MLRAU 340 yang mengikat Mahkamah ini (lihat perenggan 28–32).

(3) Walaupun dari segi merit, permohonan semakan kehakiman hendaklah ditolak. Mahkamah Perusahaan dengan tepat telah memutuskan berdasarkan keterangan bahawa pemohon gagal membuktikan kes pemecatan konstruktif (lihat perenggan 33).

(4) Tanggungjawab untuk menyelia dan memantau tapak projek Tasik Kenyir adalah dalam bidang tugas pemohon dan tidak melanggar terma kontrak perkhidmatannya. Pemohon tidak dipindahkan ke Tasik Kenyir sebagaimana yang dikatakannya. Dia hanya dikehendaki berada di tapak projek tersebut selama 3–4 hari seminggu bagi tempoh tiga bulan. Pemohon masih ditempatkan di ibu pejabat syarikat di Bukit Idaman. Alasan mengenai pemindahan tempat kerja adalah tidak berasas, begitu juga dengan alasan bahawa dia tidak diberikan notis terperinci mengenai bidang tugas dan notis mengenai bayaran balik perbelanjaan (lihat perenggan 43, 50, 52 & 62–63).]

Cases referred to

Anwar bin Abdul Rahim v Bayer (M) Sdn Bhd [1998] 2 MLJ 599; [1998] 2 CLJ 19, CA (refd)

Hotel Equatorial (M) Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor [1984] 1 MLJ 363; [1984] 2 CLJ 6, FC (refd)

Jegathisvararau Ramachandran v Sem Siong Industries Sdn Bhd Kuala Lumpur [2022] 4 ILR 604 (distd)

Keruntum Sdn Bhd v The Director of Forests & Ors [2017] 3 MLJ 281; [2017] 4 CLJ 676, FC (refd)

Metaldek Industries Sdn Bhd v Kamaruddin bin Tokimon & Ors [1998] 7 MLJ 342; [1999] 2 CLJ 761, HC (distd)

Rosli bin Saad v SG Concrete Products (M) Sdn Bhd and another appeal [2025] 4 MLJ 274; [2024] MLRAU 340, CA (refd)

Tan Lay Peng v RHB Bank Bhd & Anor [2024] MLJU 840; [2024] 6 CLJ 315, FC (refd)

Weltex Knitwear Industries Sdn Bhd v Law Kar Toy & Anor [1998] 7 MLJ 359, HC (refd)

Wong Chee Hong v Cathay Organisation (M) Sdn Bhd [1988] 1 MLJ 92; [1998] 1 CLJ 45, SC (refd)

Legislation referred to

Industrial Relations (Amendment) Act 2020 ss 25, 35, 35(1)

Industrial Relations Act 1967 ss 20, 20(1), (3), 33A, 33A(1), 33B(1), 33C

Rules of Court 2012 O 53

Tan Wee Jiun (M Scully) for the applicant.
Khoo Ai Theng (Ng, Zainurul, Seke & Khoo) for the first respondent.

Amarjeet Singh J:

INTRODUCTION

[1] On 21 January 2025, I dismissed the judicial review application brought by the applicant, Hasnah bt Hashim ('the claimant') to quash by an order of certiorari, the award dated 3 July 2023, wherein her claim of constructive dismissal by her employer, Bina Puri Sdn Bhd ('the company'), was dismissed by the Industrial Court ('the impugned award'). The claim in the Industrial Court was commenced pursuant to a reference under s 20(3) of the Industrial Relations Act 1967 ('the IRA').

[2] This judgment contains the reasons for my decision.

BACKGROUND

[3] On 4 February 2008, the claimant commenced employment with Bina Puri Construction Sdn Bhd on a contract basis as its Mechanical & Electrical ('M & E') Manager. She was then confirmed on a permanent basis in 2011. In a letter dated 29 June 2011, she was offered the post of Senior Manager M & E and was subject to inter-company transfer. She was transferred to the company by way of an inter-company transfer as Senior Manager M & E (Grade L3A) for the KLIA 2 project at Sepang.

[4] Upon the completion of the KLIA 2 project, the claimant was vide letter dated 22 September 2014, was transferred to the company's headquarters at Bukit Idaman, Selayang. She was given salary adjustments in 2015, the executive share option was extended for five years from 12 April 2016, and a share issuance scheme pursuant to a letter dated 17 February 2020.

[5] In March 2020, the COVID-19 pandemic hit the country, and the company, being in the construction business, was hit hard and was facing financial difficulties. On 28 April 2020, the company imposed the following austerity measures: (a) all staff receive half pay for the entire month of May; and (b) unpaid leave on every second and third Friday of the month. A memorandum dated 21 May 2020 was issued on austerity measures which included a freeze on the recruitment, no relocation and transfers, and no contract renewal. Memorandums were issued on 10 June 2020, 18 June 2020, 6 July 2020, 11 August 2020, and 15 December 2020, extending the austerity measures.

[6] The claimant disagreed with the voluntary salary cut and the unpaid leave measures taken by the company to mitigate the financial impact on the company. She requested for other options, one of which was a mutual separation scheme ('MSS'). The company offered her a scheme, which she rejected, and proposed a counter-offer. Negotiations took place on 12 January 2021, 14 January 2021, 18 January 2021, 1 March 2021, 17 March 2021, and 31 March 2021, but to no avail, as an agreement on an MSS could not be reached.

[7] On 10 March 2021, the company, via a memorandum, informed its staff that the austerity measure of voluntary unpaid leave on Friday would continue until further notice and would make an announcement to cancel the practice once the economic condition was favourable.

[8] The company had two projects, one in Pengerang, Johor, and the other in Tasik Kenyir, Terengganu. In a letter dated 26 April 2021, the company informed the claimant that she would be overseeing the Tasik Kenyir project and collaborating with the main contractor for the project.

[9] On 3 May 2021, via a notice of resignation, the claimant claimed that she was constructively dismissed as the company had imposed additional duties and responsibilities on her. The letter of resignation read as follows:

> Subject: Notice of Resignation
>
> Please accept this letter as my formal notification that I am forced to leave from my position as General Manager, M & E of Bina Puri Sdn Bhd with immediate effect.
>
> I take it as constructive dismissal by the action of the management of Bina Puri to add the new responsibility of the Kenyir Project in my portfolio while expecting me to spend 3–4 days a week in Kenyir.
>
> This immediate posting to a totally new project to me was made without giving due notice and in the midst of a discussion with the HR managers on the MSS package.
>
> Attached please find the chronological events of the MSS discussion as well as the Kenyir issue.
>
> Thank you

[10] The company responded immediately on 4 May 2021, the next day. The letter read as follows:

> Subject: Notice of Resignation
>
> The Notice of Resignation dated 3rd May 2021 refers.
>
> 2. Firstly, the company does not accept you allegation of constructive dismissal, hence your notice of resignation is not valid.

3. Secondly, the allegation made is also baseless. The reason the company requested for you to assist in the Tasik Kenyir Project is because of your M & E expertise and the urgent need for an M & E expert to supervise and coordinate the project site.

3.1 Our sub-contractor for the Tasik Kenyir Project, PCS Vision Sdn Bhd, was unable to find a suitable Mechanical & Engineering (M & E) personnel to be stationed at the site and to supervise the Tasik Kenyir Project. This had led to conflicts between our subcontractor and the Consultant, which in result caused serious project delays.

3.2 Our company, being the main contractor of the Tasik Kenyir Project is required to offer our assistance by sending an M & E expert to the project to coordinate between PCS and the Consultant in order to resolve various M & E issues and subsequently, preform Testing and Commissioning and obtain Certificate of Completion and Compliance.

3.3 As you are the only M & E expert in the company, it is only logical to have you to attend/assist in solving the M & E issues at the project site. Moreover, it is within your job scope and expertise.

4. Further, the company understood that this project is unfamiliar to you and was requested to assist on an urgent basis, as such, the company had made arrangement for 2 other personnel, Mr Anthony and Mr Png to travel to the project site with you on 3rd May 2021 to brief you the details on the M & E issues faced at the project site.

5. As such allegation made by you is baseless and false.

6. Kindly report to work this Wednesday, 5th May 2021, to explain/clarify to the company on allegations made, and we shall treat 3rd and 4th May as unrecorded leaves. Failure to do so, we shall consider you have resigned voluntarily and the company reserves its rights to claim damages (including but not limited to the pay in lieu of notice) in regard to this matter.

Yours faithfully,

[11] A letter dated 5 May 2021 was also issued for the claimant to cross the district to work according to the directions imposed by MITI. A further reminder dated 11 May 2021 was issued requiring the claimant to report for work after Hari Raya Aidilfitri. The claimant refused to budge from her position and refused to heed the instruction to report for work. This was made clear in her letter dated 13 May 2021, wherein the claimant reiterated her stand as set out in her resignation letter dated 3 May 2021. Thereafter, the company issued a letter demanding two months' salary in lieu of resignation, which the claimant ignored on the basis that she had been constructively dismissed on the 3 May 2021.

[12] On 3 June 2021, the claimant referred the matter to the Director General of Industrial Relations ('DGIR') as required under s 20(1) of the IRA. As the matter could not be resolved, a reference, dated 18 February 2022, was

made by the DGIR under s 20(3) of the IRA to the Industrial Court for an award. The Industrial Court delivered its award on 3 July 2023.

[13] On 2 October 2023, the claimant filed an application for leave to commence judicial review proceedings under O 53 of the Rules of Court 2012.

DECISION OF THE INDUSTRIAL COURT

[14] The learned chairman of the Industrial Court ('the learned chairman') correctly identified the issue being whether the company had, by giving the claimant the added responsibility to oversee the Tasik Kenyir project in her portfolio, amounted to constructive dismissal. This was the only ground raised by the claimant in her letter of resignation. The learned chairman referred to and applied the test of constructive dismissal established in *Anwar bin Abdul Rahim v Bayer (M) Sdn Bhd* [1998] 2 MLJ 599; [1998] 2 CLJ 19 and *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92; [1998] 1 CLJ 45.

[15] The findings of the Industrial Court on the issue of constructive dismissal were as follows:

(a) the assigning of the responsibility to oversee the Tasik Kenyir project was within her job description pursuant to her contract of employment, and there was no breach of contract;

(b) the nature of her job required her to be at project sites and not only at the office. The reasons for the responsibility for overseeing the Tasik Kenyir project was clearly stated in the company's letter dated 4 May 2021; and

(c) there was no element of bad faith on the part of the company in assigning the claimant to the Tasik Kenyir project or had indulged in bad labour practise, which amounts to constructive dismissal at law and whether this bad labour practice which amounts or culminate to constructive dismissal.

GROUNDS OF REVIEW

[16] The ground of review pleaded in the O 53 statement in support of the application was essentially based on irrationality. The learned chairman was alleged to have done the following:

(a) giving additional responsibilities to the claimant that is to oversee the Tasik Kenyir project, which is not in her job description;

(b) the claimant's workplace in Tasik Kenyir is about 231km from the claimant's present residence;

(c) the failure to provide by way of a notice a detailed job description and duties for the Tasik Kenyir project;

(d) the failure to provide a description of the reimbursements the claimant is entitled to, ie, regarding travelling, transport, and accommodation; and

(e) failure to consider the following case-laws — *Metaldek Industries Sdn Bhd v Kamaruddin bin Tokimon & Ors* [1998] 7 MLJ 342; [1999] 2 CLJ 761 and *Jegathisvararau Ramachandran v Sem Siong Industries Sdn Bhd Kuala Lumpur* [2022] 4 ILR 604 in arriving at the decision.

ANALYSIS AND DECISION

[17] Before proceedings on the merit of the application, the company had raised a preliminary objection that the judicial review is no longer available against awards of the Industrial Court as the Legislature has expressly provided the right to appeal against such awards with effect from 1 January 2021. In other words, the matter ought to be brought to the High Court by way of appeal and not by way of judicial review.

Preliminary objection: Appeal not judicial review

[18] The company submitted that the law, as it presently stands, requires the party dissatisfied with the award of the Industrial Court to appeal the award to the High Court under s 33C of the IRA. As such, the non-compliance with the law is fatal.

[19] I have considered the law and agree with the above submission. The judicial review application is not competent and is struck out. My reasons are as follows.

[20] The law as it presently stands is pursuant to the amendments made to the IRA by the Industrial Relations (Amendment) Act 2020 (Act A1615), which came into force on 1 January 2021. Prior to the amendment, there was no provision allowing an appeal against the award of the Industrial Tribunal. The provision then existing was s 33B(1) which stated that the decision of the Industrial Court to an award in respect of the dispute between the employer and employee under s 33A(1) of the IRA 'shall be final and conclusive and shall not be challenged, appealed against, reviewed, quashed or called in question in any court'.

[21] Notwithstanding that the award is final and cannot be called in question in any court, case-law held that in the exercise of the supervisory jurisdiction of the High Court does not exclude judicial review (see *Hotel Equatorial (M) Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers*

& Anor [1984] 1 MLJ 363; [1984] 2 CLJ 6).

[22] Section 33A and s 33B(1) of the IRA has been deleted by Act A1615, and in their place was introduced s 33C, which specifically provides the right of appeal against the award in the following terms:

> (1) If any person is dissatisfied with an award of the Court made under section 30, such person may appeal to the High Court within fourteen days from the date of receipt of the award.
>
> (2) The procedure in an appeal to the High Court shall be the procedure in the Rules of Court 2012 [P.U. (A) 205/2012] for an appeal from a Sessions Court with such modifications as the circumstances may require.
>
> (3) In dealing with such appeals, the High Court shall have like powers as if the appeal is from the Sessions Court.

[23] The amendments give rise to the question as to when a party dissatisfied with the award of the Industrial Court is required to appeal or to proceed by way of judicial review, given that the question is intertwined with a claimant's representations made under s 20 of the IRA. It is to be observed that s 20 was also amended by Act A1615. Subsection 20(1) prior to the amendment and after the amendment requires the employee to make representations claiming his or her dismissal is without just cause and excuse, and is seeking reinstatement, which case-law has recently held includes compensation in lieu of reinstatement.

[24] Prior to the amendment, s 20(3) provided that if the representations are not settled, the Minister is required to decide whether or not to refer the representations to the Industrial Court for an award. The Minister makes the reference even after the amendment, as long as the representations are made before the amendment. The DGIR is under a duty to make the reference on representations made only after the amendment. The Industrial Court is seized with the power to determine the dispute stated once the reference is made to the Industrial Court.

[25] The timing of making the representations, whether before or after the amendment, becomes significant to the question of whether the award made by the Industrial Court ought to proceed by way of appeal or judicial review. How is the determination to be made is solved by the s 35 of Act A1615, which provides for the saving and transitional provisions concerning, inter alia, the representations made prior to the amendment.

[26] Subsection 35(1) of the Act A1615 is relevant to the matter before this court and is in the following terms (emphasis added):

> (1) Complaints made under s 8, disputes referred under subsection 9(1A), claims

A for recognition made under s 9, representations for reinstatement made under s 20 of the principal Act, and all proceedings commenced or awards made before the Industrial Court in relation to a reference under subsection 8(2A), subsection 20(3) and s 26 before the coming into operation of this Act shall proceed and have effect as if the principal Act had not been amended by this Act.

B

[27] Recently, the Court of Appeal in *Rosli bin Saad v SG Concrete Products (M) Sdn Bhd and another appeal* [2025] 4 MLJ 274; [2024] MLRAU 340 had cause to determine the interpretation of s 25 of Act A1615. In that case, an appeal was filed against the award of the Industrial Court, which had held that C the dismissal was with just cause and excuse. The High Court proceeded to hear the appeal and reversed the Industrial Court, including dismissing the preliminary objection raised that the employee that the remedy of appeal was not open to the employer. The employee appealed to the Court of Appeal.

D

[28] The Court of Appeal interpreted s 35(1) of Act A1615 as follows:

> In essence, s 35 of Act A1615 states that where any representation for reinstatement is made under s 20 of the Act before the coming into force of the amended Act, it shall proceed under the unamended Act.

E and proceeded to set out the two scenarios that arise from the said subsection:

> (i) if the representations are made before 1 January 2021 and the Minister's reference is made before 1 January 2021, the unamended Act applies and any challenge against the award of the Industrial Court can only be made by way of judicial review proceedings; and
>
> F
>
> (ii) if the representations are made before 1 January 2021 and the Minister's reference is made after 1 January 2021, the unamended Act applies and any challenge against the award of the Industrial Court can only be made through judicial review proceedings.

G

[29] The Court of Appeal in *Rosli Saad* further held that under s 35(1) of Act A1615, the date the representations are made is the crucial factor that determines the manner a challenge against the award of the Industrial Court is to be made. On the facts, the Court of Appeal found that the representations H were made before 1 January 2021, although the Minister made the reference on 24 April 2021 (ie, after Act A1615 came into force). In the circumstances, the Court of Appeal concluded that the proper manner of challenging the award of the Industrial Court was by way of judicial review. The High Court had therefore erroneously entertained the appeal made by the employer. The I decision of the High Court allowing the employer's appeal was therefore set aside, and the award of the Industrial Court was reinstated.

[30] What is clear is that s 35(1) of the Act A1615 does not apply where the representations are made after 1 January 2021. If representations are made to

the DGIR after 1 January 2021, the remedy for a party which is dissatisfied with the award of the Industrial Court is to appeal against the award to the High Court under s 33C of the IRA as amended against the award of the Industrial Court.

[31] I am bound by the Court of Appeal's interpretation of s 35(1) of Act A1615. What is left now is to apply the law to the facts. The undisputed facts show that the claimant considered herself constructively dismissed on 3 May 2021, ie, the day she walked out from the employment. The representations were made to the DGIR on 3 June 2021, ie, after Act A1615 came into force.

[32] This was not a case where s 35(1) of Act A1615 was applicable since the representations were made after 1 January 2021, specifically, on 3 June 2021. The preliminary objection was rightly taken as the challenge in the instant case ought to have proceeded by way of an appeal and not by way of judicial review. Accordingly, the instant judicial review application is struck out on this ground alone.

Constructive dismissal: burden of proof

[33] I now append my reasons for dismissing the application on its merits. The learned chairman had correctly found on the evidence before him that the claimant had not fulfilled the requirements of constructive dismissal. I hold that the learned chairman did not commit any error of law, whether on illegality or of the irrationality kind.

[34] Before I go into the discussion on the merit of the application, it is opportune to make clear the burden of proof when the Industrial Court is carrying out its mandatory function of determining whether the dismissal complained of by the employee is with or without just cause and excuse. The issue was raised by the claimant in her written submissions, where the learned chairman had committed an error of law concerning the burden of proof in the following words: disregarded the legal principle in regards to the difference between legal and evidential burden and the shifting of the onus of proof.

[35] The submission is a bare statement. There is no explanation or in any way demonstrated to this court that the learned chairman had committed an error regarding legal and evidential burden. On the contrary, the learned chairman had correctly stated that the burden of proof to prove constructive dismissal is on the employee and had referred to *Weltex Knitwear Industries Sdn Bhd v Law Kar Toy & Anor* [1998] 7 MLJ 359 where it was said that if the employee fails, there is no onus whatsoever on the employer to establish anything for in such a situation no dismissal has taken place and the question of the dismissal being without just cause or excuse would not at all arise.

[36] After his stating his findings, the learned chairman concluded as follows: there is no breach of contract on the facts adduced by the claimant that gives rise to a claim of constructive dismissal.

The burden of proof

[37] The burden of proof concerning disputes adjudicated by the Industrial Court is trite. Where the employer has dismissed its employee, the fact of dismissal is not in dispute. In such cases, the burden is on the employer to satisfy the court that such dismissal was with just cause or excuse.

[38] Conversely, if the employee alleges constructive dismissal, the situation where it is the employee who has treated the contract of employment as terminated and walks out of the employment, the burden of proof is on the employee. The burden is to fulfil the conditions of constructive dismissal. If the employee fulfils the conditions, the evidential burden shifts to the employer to prove otherwise. If the employee fails to fulfil the conditions, there is no onus whatsoever on the employer to establish anything for in such a situation no dismissal has taken place and the question of the dismissal being with just cause or excuse would not at all arise and the employee would be deemed to have resigned (see *Wong Chee Hong* and *Anwar Abdul Rahim*).

[39] In this regard, it is instructive to refer to the principles concerning burden of proof and evidential burden stated by the Federal Court in *Keruntum Sdn Bhd v The Director of Forests & Ors* [2017] 3 MLJ 281; [2017] 4 CLJ 676, which is reproduced below without case-law citation:

> [78] It is settled law that the burden of proof rests throughout the trial on the party on whom the burden lies. Where a party on whom the burden of proof lies has discharged it, then the evidential burden shifts to the other party. When the burden shifts to the other party, it can be discharged by cross-examination of witnesses of the party on whom the burden of proof lies, or by calling witnesses, or by giving evidence himself, or by a combination of the different methods.

Constructive dismissal: prerequisites

[40] The conditions of constructive dismissal has been recently reiterated by the Federal Court in *Tan Lay Peng v RHB Bank Bhd & Anor* [2024] MLJU 840; [2024] 6 CLJ 315 (approving the conditions stated by the Court of Appeal in *Anwar Abdul Rahim)* and are as follows:

(a) there must be a breach of contract by the employer;

(b) that breach must be sufficiently important to justify the employee resigning;

(c) the employee must leave in response to the breach and not for some other unconnected reason; and

(d) the employee must not occasion any undue delay in terminating the contract, otherwise, he will be deemed to have waived the breach and agreed to vary the contract.

[41] The Federal Court stated that it is trite law that, in the event the employee fails to fulfil the above conditions, the employee will be deemed to have resigned, as in such a case, there is no dismissal within the meaning of the Industrial Relations Act 1967.

Constructive dismissal: applying the law to the facts

Additional duty is a breach of the contract of employment

[42] The claimant's first allegation in the O 53 statement was that the additional duty to oversee and monitor the Tasik Kenyir project was in breach of the employment contract. However, this allegation is demolished by the claimant's job description on 1 November 2014 when she accepted the position of General Manager M & E. The job description expressly stated that her duties and responsibilities, amongst others, included (see encl 4 p 163):

(a) overall planning, *co-ordination & monitoring sites activities for Building M & E Services*; and

(b) *any other duties and responsibilities as assigned by the management from time to time*. (Emphasis added.)

[43] Earlier, when she was appointed as Senior Manager M & E for the KLIA 2 project, the letter of appointment at cl 8 read as follows:

> Place of Work:
>
> At KLIA 2 Project, Sepang, or *any other place the company may direct*.

Thus, the additional responsibility of overseeing and monitoring the Tasik Kenyir project site was within her job description and not a breach of her contract of employment. The fact that she would be required to work from one project site in view of her expertise as a Mechanical & Electrical engineer was the reason of her employment. The reasons in the letter of the company dated 4 May 2021 as to why her expertise was needed in Tasik Kenyir explains her nature of her job.

[44] Further, the reason for the claimant considering herself constructively dismissed in her letter of resignation was not on the ground that the additional duty in respect of the Tasik Kenyir project was not part of her job description

or portfolio but was made without giving due notice and in the midst of discussion with the HR managers on the MSS package and expecting her to spend three to four days in Tasik Kenyir.

[45] A further reason is that the claim that the additional responsibility of the Tasik Kenyir project was not part of her job description and therefore a breach of her contract of employment was not even the claim that the Industrial Court was asked to adjudicate. In the statement of case, the claimant's case against the company was stated as follows (encl 4, p 19):

> The Claimant's Claim against the Respondent
>
> 11. At all material times, the Respondent had acted in bad faith when they issued the notice for additional duties and responsibilities in respect of the Tasik Kenyir Project, knowing very well that MSS package negotiations between the Claimant and Respondent was ongoing since January 2012. The Respondent clearly had failed, refused, neglected, and or omitted to respond or to put in writing the terms of the offer for the MSS package compensation to the claimant.
>
> 11.1 The refusal of the Respondent to pay the Claimant the MSS package compensation clearly is without just cause and excuse, and or constitutes unfair labour practise. The Respondent's conduct at all material times also was contrary to her employment contract, the rules of natural justice, equity, and good conscience.
>
> 11.2 The Claimant's last drawn salary from the Respondent was RM21,000.00. The Respondent has paid the Claimant all her salary and claims up to date after her said notice of resignation.
>
> 11.3 Accordingly, the Claimant is claiming for the relief of all unpaid outstanding MSS package compensation from the Respondent in accordance to the law, which is RM21,000.00 x 13 years of service = RM273,000.00.

[46] The claimant is bound by her pleadings. Her complaint before the Industrial Court was that the company had acted in bad faith when it issued the notice of additional duties and responsibilities dated 26 April 2021 in respect of the Tasik Kenyir project, knowing very well that MSS package negotiations between the claimant and respondent were still ongoing.

[47] The learned chairman found as follows:

> [42] Memandangkan tidak ada penyelesaian berhubung skim MSS tersebut, maka yang menuntut adalah dianggap masih menjadi pekerja pihak syarikat dan pihak syarikat mempunyai hak dan mandat memberikan tugasan kepada beliau mengikut skop kerja yang sedia ada.
>
> [48] Juga tiada pertikaian di pihak yang menuntut bahawa beliau membantah atau menolak penugasan ini atas alasan ianya tidak termasuk di dalam potfolio tugasannya. Tiada sebarang unsur-unsur negatif yang dibangkitkan oleh yang

menuntut di sebalik penugasan ini. Sebaliknya yang menuntut kelihatan berkecenderungan untuk menerima tugasan tersebut.

and concluded as follows at para [50] of the award:

Mahkamah ini juga merumuskan bahawa tiada elemen 'bad faith' di pihak syarikat di dalam memberikan penugasan ini kepada yang menuntut.

[48] The learned chairman decided the matter according to what was pleaded, and it is not surprising that there is no challenge in the O 53 statement with respect to this finding. In any event, I found no error committed by the learned chairman in respect of the finding that there was no bad faith on the part of the company.

Transfer 231km from the residence/present company address

[49] The claimant submitted that she was transferred to Tasik Kenyir, which is 231km away from her present place of residence/employment, and this amounted to constructive dismissal, which would cause her to be uprooted to Tasik Kenyir, and that she was being transferred without proper notice. The claimant alleged that the learned chairman failed to adhere to trite principles stated in *Metaldek Industries* and *Jegathisvararau Ramachandran,* cited by her.

[50] I found that the learned chairman did not commit any error of law or disregard any trite principle as alleged by the complainant in her written submissions (encl 14). In the first place, there was no transfer. The allegation that there was a transfer is not true. This can be seen from the following letters, which are contemporaneous documentary evidence:

(a) the letter dated 26 April 2021 by the company informed the claimant that she would be overseeing the Tasik Kenyir project and collaborating with the main contractor for the project; and

(b) the claimant's resignation letter dated 3 May 2021 was even clearer, there being no transfer when the claimant herself acknowledged that she would be expected to stay three to four days a week in Tasik Kenyir.

[51] More importantly, the chronology of the minutes of conversation, produced by the claimant as documentary evidence, regarding the conversations she had with company management shows that there was no transfer as alleged. The minutes of the conversations are reproduced below:

20/4/21 (Tuesday)

34. Mr We asked me to see him and informed me that Anthony and Pang came back from Kenyir *and proposed for me to assist with Kenyir. I am to be based there for 3 months*.

35. I said PCS 'total sub' the project had been on the job for a while and he was also doing RAPID so base on my understanding he has financial problem (we owe PCS 12 mil for RAPID) and I don't see what I can do to assist the project as money is the main issue.

36. Mr We replied that they still need technical support.

37. *I asked Mr We, what happened after 3 months, he said come back to HQ.*

38. I said we have team of consultants to advice on technical issues. Anyway, I will think about it and revert to him.

22/4/21 (Thursday)

39. Jane texted me and asked to see me to discuss on workers issues at Kenyir.

40. I replied I did not know anything about Kenyir and she replied that she thought I am supposed to be in charge of Kenyir.

41. I said Mr We spoke to me but no transfer letter yet.

42. She said she will update me.

27/4/21 (Tuesday)

43. Mr We asked me to see him and repeated on points raised during 20/4/21 discussion.

44. *He said I will not be based in Kenyir. He leave it to me to arrange my time. Each week, maybe 4 days there and the rest in KL.*

45. He said HR will rent a house for me.

46. I said I have not seen a letter, He said, HR will issue. He asked how soon can I go. I replied I will see the letter and revert.

47. Later part of the day, Jane issued me a letter on adding Kenyir as part of my responsibility.

48. I asked her am I base there or what, as it was not mentioned in the letter. *She said should discuss with Mr We. But her understanding is 4 days in Kenyir and the rest in KL. I said Mr We said something like that too.*

49. She said she will look for accommodation for me.

50. *Transport — use my own car since company has no car. Company will pay allowance for tol, fuel, maintenance.*

28/4/21 (Wednesday)

51. Jane came to see me and informed that she could not find a house for me. Meanwhile she will book a hotel for me from 3/5/21 onward, maybe 3 or 4 days.

52. I replied my discussion Mr We did not mention on specific date for me to go to Kenyir. *Since it is just for hotel booking, I will let her know when I want to go, so she can book a hotel for me.*

[52] Thus, the claimant was to travel to Tasik Kenyir and back. The stint was only for three months, and the last entry she did not object but said that, 'I will let her know when I want to go, so she can book a hotel for me'. There was therefore no transfer. The claimant was to still stationed at the company's headquarters at Bukit Idaman. She was to travel to Tasik Kenyir — be there for three to four days, and be back at the headquarters. This is based on her own records, which she produced before the learned chairman and which chronology was accepted by the learned chairman. For the above reasons, the learned chairman did not commit any error of law as alleged by the claimant.

[53] The cases of *Metaldek Industries* and *Jegathisvararau Ramachandran* relied on by the claimant are easily distinguishable on the facts and do assist the claimant.

[54] In *Metaldek Industries,* the employees were employed by the company, a factory, which was in Shah Alam. The company informed the employees that the Shah Alam factory will be shut down and the factory relocated to Ipoh, which was 250km from the present location. The employee did not report for work at the Ipoh factory as required by the company and instead filed for termination benefits at the Labour Office. The labour officer agreed with the employees and awarded them termination benefits. The company appealed to the High Court. The High Court held that the employees were justified in regarding themselves as terminated from employment.

[55] The learned judge of the High Court said that what was taking place was a relocation of the business premises as the company had moved its sole business premises, ie, the factory, from Shah Alam to Ipoh. It was not a transfer as a transfer involves the movement of the employee within the divisions of the organisation which have been established at the time the contract between the parties were concluded.

[56] Further, there was no express or implied right of transfer in the contract of employment, as the factory in Ipoh only became operational after the contract between the parties was entered into. The distance between the relocated factory and the original factory site was 250km. This distance would cause considerable inconvenience to the employees who would have to either move their families to Ipoh or leave them in Shah Alam. It was on these facts that the High Court considered the employees terminated by the company.

[57] In *Jegathisvararau Ramachandran,* the employee was a senior security officer, and his job scope is to monitor and supervise the work of his subordinates, ie, security officers. A few years into the employment, a new head of security was appointed, and that was when the employee's problems began. The employee was assigned to do work that was performed by his subordinates.

[58] The work assigned by the new head of security was not within his job scope of the employee and amounted to a demotion. The claimant was also transferred to other working areas of the company's properties abruptly without proper notice and was verbally abused by the new head of security. The employee wrote a letter to the company detailing the express and implied breaches of his contract of service as a result of the above actions and requested the company to remedy the said breaches.

[59] The company did not deal adequately with the grievances raised by the employee in his letter to remedy the breaches. The Industrial Court said that the excuse given by the company that the duties and responsibilities of the employee can change from time to time does not mean that the employee can be given a job that is not suitable and not in line with his position in the company and in the event the employee refuses to perform such unreasonable job assignment, the company cannot take it upon itself to label the employee as acting in an insubordinate manner as done by the company in this case.

[60] The Industrial Court found that the new head of security had put in place a series of acts intended to cause the employee mental anguish, humiliation, and a demoralised outlook, all with the view that the employee would eventually be driven out of his employment with the company. The Industrial Court held that by the impugned actions, the failure of the company to deal adequately and fairly with the express and implied breaches of his contract of service, the company had breached the fundamental terms of his contract of employment and evinced an intention to no longer be bound by it. Thus, on the above facts, the employee was found to be constructively dismissed

[61] Therefore, the claimant was relying on cases that are irrelevant to the facts of the instant case. In the instant case, there was no transfer of the claimant or relocation of the business of the company to Tasik Kenyir. The Tasik Kenyir project was one of the projects of the company nationwide. The assignment of new duties was expressly stated in the contract of employment and for which the claimant was employed by the company to do.

[62] The ground alleging transfer was therefore devoid of any merit.

Notice of detailed job description and reimbursements

[63] The grounds of review are that there was no notice of job description, and notice of reimbursements can be taken together. First and foremost, not one of these reasons were given by the claimant gave for being constructively dismissed. Secondly, the failure to give the notices was not in her statement of case (see para [45] above). Thirdly, these grounds were not raised in the

claimant's written submissions because it would be against the ground of transfer the claimant was raising. The grounds are devoid and are dismissed.

CONCLUSION

[64] For the above reasons, I dismissed the application with costs.

Application dismissed with cost.

Reported by Ashok Kumar